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MEDICO-LEGAL RELATIONS.

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SOME CONSIDERATIONS UPON THE NAVAL RETIRING BOARD IN MEDICO-LEGAL RELATIONS.

By T. J. Turner, A. M., M. D., Ph. D., Medical Director, U. S. N.

The "*raison d'être*" of this paper had its origin in the writer's duty connected with the Naval Retiring Board. Previous to being ordered upon this service, an inattentive reading of the law constituting the structure of the Board and in general detailing its functions led to the thought that the duty was simple and patent enough, but on entering upon the work the magnitude of the interests involved, alike to the individual as well as the Government, the investigation needed, the modes of procedure, and the method by which the final results are to be attained, soon made it evident that a profounder study of the whole matter was necessary in order to faithfully and diligently perform the duty assigned. To do this intelligently the subject-matter had to be examined after the modes of my profession, for it is apparent that the matters involved in the retiring law include all that can be grouped as a medico-legal diagnosis. The Board as constituted is a specialized one, and has its analogues in the special juries of the English code, its function, also special, that of retirement, and it is to the adaptation of this structure to the function that it is proposed to consider. Its work is of such a medico-legal character that the writer was compelled to renew his studies in the domain of the jurisprudence of medicine, alike for his instruction as well as in the hope that the results of the study would be of service to the medical officer of the Navy upon whom in the future this duty may devolve.

The positions of a medical member of the Board are, (1) that of an ordinary witness, (2) that of an expert witness, and (3) that of a concurrent judge of both the facts and the law; but with the execution of the verdict or finding the Board has no authority whatever. In the first instance, medically speaking, the medical officer makes a *physical* diagnosis, and herein he has to a great degree certain standards to weigh and measure—such facts as temperature, pulse, respiration, heart sounds, aspect, gait, deformity, &c., objective phenomena in the main; in the second instance, as to age, thirst, hunger, sensations, previous history, &c., subjective phenomena, the medical officer makes a *rational* diagnosis, and herein there is no settled standard to weigh or measure such facts. Combining these, he arrives at his conclusion, verdict, or finding. Now, the framers of the law builded better than they knew in the construction of the Board. A part of the evidence in any case of retirement is that presented after a personal physical examination, and becomes testimony as to matters of fact; the previous history and all antecedent medical history are, in a great measure, certified medical records, the medical-opinion testimony of the witnesses based upon facts observed at the time of making the record. It was an advance in the jurisprudence of medicine so to frame the law under consideration that, upon the entirety of the evidence, medical in character as it is, medical officers should be part of the tribunal. It is proposed now

to enter upon such considerations as are necessary in the opinion of the writer to be understood before their application to the law of retirement.

On questions of science, skill, art, trade, and the like, persons instructed upon such subjects-matter, alike by study or experience, or both, known in ordinary language as "experts," are permitted, from the *necessities* arising in such cases when under question before the courts, to give "matters of opinion" in evidence, and as to the necessity which permits the introduction of such opinions each tribunal determines for itself at the time. Herein the expert differs from the ordinary witness, who testifies to "matters of fact" coming under his personal observation. This distinction seems patent enough, but the boundary line where ordinary testimony ends and expert testimony begins is not in all cases well defined and it will be found an exceedingly difficult matter to determine. Now, the definition of an expert, to bring it within the judicial ruling—that is to say, that permits the admission of such person's opinion as evidence—is one who has skill, experience, or peculiar knowledge on certain subjects of inquiry in science, skill, art, trade, and the like. In the courts, it appears to be the practice to admit any one who had a *prima facie* right to be considered as an expert. "Generally, nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular art or profession." (Greenleaf.)

As far as relates to opinions on medical questions any one, it appears, may be permitted to testify, the extent of the special amount of knowledge, no matter how acquired, being left for the jurors to determine. It follows from this extensive range of so-called experts that there is no evidence the value of which varies so immensely, and—as it is impossible *a priori* to measure the integrity of a witness and equally so to determine the amount both as to quantity or quality of the skill which a person professing a particular science, art, or trade may possess—in which it is so difficult to lay down rules beforehand. It undoubtedly must appear that a witness called in such capacity has had some means of acquiring special knowledge upon the subject in question, but as to the means or amount of acquisition of such knowledge or the extent or both there can be no rule laid down. Thus a medical opinion may be received as evidence founded upon study without practice (State *v.* Wood, 53 N. H., 484), or by practice without study (Mason *v.* Fuller, 45 Vt., 29); and it has been ruled that it is not absolutely necessary that one should have studied or practiced medicine (Re Toomes, 54 Cal., 515). The legal maxim "Cuilibet in sua arte perito est credendum" does not in any manner suggest either the quantity or the quality of the skill. This is left to the judges and jurymen, who are not apt to inquire with any great degree of accuracy into the *causa scientiæ*, the means by which the expert witness has the right to form a judgment or give an opinion. Each tribunal from necessity forms its own judgment of the value due to the expert testimony upon the matters brought before it, and that value will vary with varying tribunals to an indefinite extent. Rossiter Johnson observes, "How much the value of the *opinions* of the expert witness as compared with the *facts* of the ordinary witness may effect each other is yet to be determined, for some men's opinions are worth more than some men's facts." It must be constantly borne in mind, however, that the expert is called upon as *amicus curiæ* to give the benefit of his knowledge, recondite or otherwise, acquired by years of study and experience and observation. Sloane remarks that to make such knowledge of use in any given case the facts and questions at issue must be studied. The expert's testimony is the result of his

professional information applied to the case after a special study of it. It may not be out of place here to quote from Elwell upon the duties and requirements of experts: "An expert is selected by the court or parties concerned for his supposed special knowledge or skill in particular matters to which he is to testify or make a report embodying his opinions. These opinions or conclusions of judgment which make up such opinions of experts are the same in substance as the verdict of a jury or judgment of a court." He further observes that although the *facts* upon which the opinion is based may be called for, yet from the very nature of the case it is not to be expected that the jury or court will understand them. Now, the opinions of medical men are admitted in the courts—

(1) Upon the condition of the human system. Thus, is or was a certain person sick. (Lush *v.* McDaniel, 4 Ired., 485.)

(2) The nature and cause of disease. (McLean *v.* State, 16 Ala., 672.)

(3) The cause of *death.* (Lord *v.* Beard, 79 N. C., 5.)

(4) The cause or effect of an injury. (Taylor *v.* Railway, 48 N. H., 304.)

(5) The effect of a medicine or particular treatment. (Hoard *v.* Peck, 43 Miss., 472; Barber *v.* Merriam, 11 Allen, 322.)

(6) The likelihood of recovery. (Matteson *v.* N. Y. Cent. R. R. Co., 62 Barb., 364.)

(7) The mental condition of the person. (State *v.* Hayden, 51 Vt., 296, *et al.*)

(8) Upon an examination of the party whose condition is under inquiry. (Bitner *v.* Bitner, 65 Pa. St., 347.)

And under these groupings all of the wounds, injuries, casualties, and disabilities arising from disease or exposure which are the subjects of professional study in the naval service can readily be distributed.

It is the writer's opinion that the term "expert testimony" is a somewhat misleading one, and he prefers the term "opinion evidence," as used by Best, as preferable; for opinions may be admitted as evidence by those who could not by any mental admeasurement known be classed as "expert." It is assumed that every medical man is *ipso facto* an expert and qualified to give an opinion upon all matters relating to his profession. That this assumption is unqualifiedly not so is self-evident to members of the profession, and it does not require much of demonstration to render such fact plain to the mind of the intelligent layman. The facts, in the opinion of the writer, that should be primarily determined antecedent to the admission of opinion evidence are—for it is an error to allow a witness to testify as an expert without preliminary examination as to his qualifications (State *v.* Secrest, 80 N. C., 450)—has the so-called expert had more than the usual amount of opportunities to observe such matters as he is expected to give an opinion upon, or has he any special knowledge of the matters in inquiry so as to give relevant answers to the questions presented for his consideration? With these opportunities granted, what use has been made of them, or to what extent has been the course of reading or study in the direction of the inquiry, opportunities for observation or experience being absent? It is at once admitted that herein are presented matters that cannot well be reduced to a common measure. Much must be left to the powers of judgment of those to whom the opinion evidence is to be presented. The test of the admissibility of opinion evidence seems to the writer to be this: Has the expert witness any peculiar knowledge or experience, not common to the world, which renders his opinion, founded upon such knowledge or experience, upon the subject-matter under inquiry of value to the court in determining the truth of the matters at issue? It is beyond question that the degree of credence given to opinion evidence should

be founded upon and associated with the professional skill, the quickness of perception, the power of discernment, the aptitude, the acquirements, the education, as well as the experience and observation of "the expert" in matters upon which questions demanding his special expert knowledge arise. And this degree of credence will vary with the estimate made by the court of the ability of the expert, the which he should be abundantly able to exhibit beyond doubt or misgiving, as well as to enforce the conviction of the truth of his opinions to all concerned. Bunsby could give "an opinion as is an opinion," which would have a zero value by the side of one presented by Luce, upon nautical matters; yet both would be classed as experts upon the art and mystery of the mariner. Bearing these suggestions and rules in mind, as well as that opinion is not evidence without assigning reason for such opinion, each case demanding medical-opinion evidence becomes a problem to be solved by their application, and the paper is presented to his corps in the Navy as the result of some study, reading, work, and experience for their use. It may not be out of place here to call attention that the facts herein set forth have a practical association with the duties imposed upon medical officers of the Navy both by law and regulation, to wit, in the records of cases in medical journals, reports of medical surveys, certificates of death, abstracts, hospital tickets, records of physical examinations, and in all records that may involve claims for pension. With this introduction, we are prepared to enter upon the application of these general rulings to the consideration of the Naval Retiring Board considered in its medico-legal relations.

RETIREMENT.

SEC. 1448. Whenever any officer, on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a Board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy. Said board, except the officers taken from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of. (3 Aug., 1861, s. 23, v. 12, p. 291.)

SEC. 1449. Said Retiring Board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry as may be necessary. (3 Aug., 1861, s. 17, v. 12, p. 290.)

SEC. 1450. The members of said Board shall be sworn in each case to discharge their duties honestly and impartially. (3 Aug., 1861, s. 23, v. 12, p. 291.)

SEC. 1451. When said Retiring Board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service. (*Idem.*)

SEC. 1452. A record of the proceedings and decision of the Board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, or orders in the case. (*Idem.*)

[NOTES.—No power of review over the proceedings of a Retiring Board exists by law where its finding has been once approved by the President and his "orders in the case" executed.—Op. XV, p. 446. Devens, Feb. 8, 1878. Rodney's case.

Where a naval Retiring Board, convened to inquire into the nature and cause of the disability of an officer has once finished its work, rendered a complete judgment in the case, and adjourned, a subsequent reconsideration of its judgment by the board, unless authorized or directed by proper authority, can have no legal effect.—Op. XVI, p. 104. Devens, July 25, 1878. Rodney's case.]

SEC. 1453. When a Retiring Board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter Eight of this Title. (3 Aug., 1861, s. 23, v. 12, p. 291.)

SEC. 1454. When said Board finds that an officer is incapacitated for active service and that his incapacity is not the result of any incident of the service, such officer

shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay, as the President may determine. (See Aug. 5, 1882, *ante.*)

SEC. 1445. The two preceding sections shall not apply to any lieutenant-commander lieutenant, *lieutenant of the junior grade*, ensign, passed assistant surgeon, passed assistant paymaster, *passed* assistant engineer, assistant surgeon, assistant paymaster, or *assistant* engineer; and such officers shall not be placed upon the retired list, except on account of physical or mental disability. (15 July, 1870, s. 6, v. 16, p. 333. 24 Feb., 1874, v. 18, p. 17. 3 March, 1883, P. E. L., p. 472.)

Whenever on an inquiry had pursuant to law, concerning the fitness of an officer of the Navy for promotion, it shall appear that such officer is unfit to perform at sea the duties of the place to which it is proposed to promote him, by reason of drunkenness, or from any cause arising from his own misconduct, and having been informed of and heard upon the charges against him, he shall not be placed on the retired list of the Navy, and if the finding of the board be approved by the President, he shall be discharged with not more than one year's pay. [See § 1456.] (Aug., 1882, P. E. L., p. 286.)

SEC. 1455. No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy Retiring Board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion.

Such are the sections of Title XV, Chapter 3, of the Revised Statutes of the United States, together with that part of the act of Congress approved August 5, 1882, which defines the structure of the Naval Retiring Board, and in a general manner details and indicates its functions when organized.

The sections have been arranged in their natural sequence and will be in that manner considered.

It is to be observed in the terms of the law, section 1448:

(1) When any officer, on being ordered to perform the duties appropriate to his commission, reports himself *unable* to comply with such order;

(2) Or whenever, in the judgment of the President, an officer is *incapacitated* to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a Board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy.

(3) Said Board, except the officers taken from the Medical Corps, shall be composed as far as may be, of seniors in rank to the officer whose *disability* is inquired of.

And here it is well to have a distinct understanding of the meaning of the terms to which attention is to be called; thus:

Unable: Not able.

Incapacitated: Inability to discharge a duty or to fill an office.

Disability: The state of being disabled.

Practically the words are of equal value and are synonymous with *incapacitated.*

It is apparent that these terms have no other reference or association save with *physical* condition, as a whole, of the officer ordered to appear before the Board.

It is also evident that the inquiry being one as to physical incapacity, a *special* knowledge is required to determine such incapacity; that is to say, medical skill and experience, study and observation are necessary, and from these facts the inquiry falls under the cognizance of the medical-opinion evidence of the medical members of the Board.

Again, as the purpose of this paper is to show the medico-legal relations involved in the law, it is proper to show these relations in connection with the terms already defined, thus:

Unable *to comply with such order.*

Incapacitated *to perform the duties of his office.*

Disability *inquired of.*

It does not require any profound degree of logical acumen to deter-

mine that, apart from each other, the facts, as stated, would reduce the retiring law to an absurdity. It is the opinion of the writer that the whole question of retirement belongs to the domain of the jurisprudence of medicine, and the facts upon which this opinion is founded will be presented in this paper.

To resume:

Section 1449. The case of such officer having been referred to a Board composed as stated in the preceding section, "said Retiring Board shall be authorized *to inquire into* and *determine* the *facts* touching *the nature* and *occasion* of the *disability* of any such officer."

That no term in the law shall be misconstrued, it is proper here to define *Fact*—a thing done; a circumstance, event, or occurrence.

To comply with the requirements of this section involves:

(1) The personal physical examination of the officer for the purpose of determining if such officer is incapacitated and the nature of the incapacity if any such exists. The facts ascertained upon this examination place the examiners within the category of those known to jurists as expert witnesses.

Thus the medical officers upon whom this duty falls discover that certain physical phenomena exist in the person of the officer; these they group. This grouping indicates that the phenomena are connected with changes in some one of the systems of the body, the special organ or system is singled out to which the aberrations are referred and the cause determined.

The whole matter is one of physical diagnosis, plus the etiology of the incapacity. The facts demonstrate that A is sick, the opinion that he has a specified affection; that he is unable to perform the duties of his avocation, and that his sickness resulted from some cause, either proximate or remote, predisposing or exciting, are all within medical cognizance.

(2) An examination into the record and documentary evidence comprising the past medical history of the officer obtained from the files of the Bureau of Medicine and Surgery and from all other authentic sources.

The facts obtained upon this examination are the *facts* and *opinions* of medical officers and others having had special knowledge of the subject.

To group these matters so as to present them in a proper and legal manner, the practice is as follows:

The presiding officer addresses the following letter to the medical members of the Board:

NAVAL RETIRING BOARD,
NAVY DEPARTMENT,
Washington, ———, 188–.

GENTLEMEN: You will be pleased to make a careful examination into the past and present physical condition of ——— ———, U. S. Navy, whose case has been referred to this Board for examination, and report as to his capacity to perform the duties appropriate to his commission, in conformity with Title 15, Chapter 3, of the Revised Statutes of the United States.

Besides a personal examination, you will examine, closely, the records on file at the Bureau of Medicine and Surgery, and obtain careful copies of the records which bear on the case; and also endeavor to obtain from any other authentic source within your reach such information as will aid the Board in the performance of their duties, and report the result in writing.

Very respectfully,

——— ———,
——— *and President of the Board.*

To—

——— ———,
——— ———.

Upon the presentation of the report called for, it is made testimony by being admitted under oath or affirmation.

Now, the inquiry having been made and the facts determined, the nature of the incapacity is described, and its occasion, in so far as can be ascertained from all sources, narrated. To do all this involves the facts and opinions of the medical witnesses. Not only are the medical officers of the Board called upon to testify to the special facts as gathered by the evidence of their senses at the personal physical examination, but they are to give the deductions, drawn from the facts given by others. Having all these before them, they are to apply to the whole group their special or expert knowledge; from these reach a conclusion in their own minds, and so present their opinion. No more decided rule can be observed here than that proposed by Sawyer in speaking of medical witnesses: "He should listen attentively to the testimony as to all the facts of the case and avail himself of every authentic means of forming a correct opinion."

Again, section 1451:

(1) When said retiring board finds an officer *incapacitated for active service.*
(2) It shall also find and report the *cause* which in its judgment *produced his incapacity,*
(3) And whether such cause is an *incident* of the service.

To perform all the duties in active service requires a sound mind in a sound body. Every advancement of promotion is preceded by a physical examination, and these are matters of record in so far as measurements by physical instruments can determine the sum total of mental vigor with physical endurance. It is not a part of this paper to describe in detail the various special conditions that incapacitate an officer for active service. Each case has its own environment and is a law unto itself. Prominently, defects in any of the various systems, pathological conditions involving grave structural or functional changes in any one or more systems, the rapidity of the senile atrophic changes, all tend to incapacitate for active service. Acute affections and even some chronic disorders for the time being incapacitate, but due regard is had to the temporary or permanent nature of the incapacity. The endeavor in each case is to determine the prognosis as far as it possibly can be so determined. The nature of the incapacity must be such as to permanently disable an officer from performing all his duties. The clause also has its medico-legal aspect—*the incapacity* being the medical, *for active service* the legal side. Much is left to the judgment of the medical officer from the very necessities of the case.

The second clause in the section opens up the whole field of etiology or causation. Some of the causes of incapacity are at once evident; others become so by association with duties performed. Exposure on shipboard within geographic limits; proximate, remote, exciting and predisposing causes, the mode of life, climate, special duties; the sequences of diseases, &c., are all to be considered in the phenomena of the causation of the production of incapacity. Time, place, and circumstance—in fact the whole surroundings—must be considered, and the facts so obtained interpreted by judgment.

The third clause, "and whether such cause is an incident of the service."

The words "an incident of the service" in a general manner indicate that which is liable to happen, that which pertains to, is dependent upon, is related to—an occurrence, an event, casualty, or condition of things. Here again the medico-legal bearing of the law becomes evident and does not need to be demonstrated, for the previous applica-

tion of the facts apply with like force and weight. Much confusion, it may be here stated, has arisen in the minds of persons having to deal with the retiring law by making the very natural association of these terms with those of "in line of duty." That there is an association is not to be questioned, but that they are to be considered apart is also evident.

Thus far the presentation of the case has been made by the medical members of the Board, but in nowise does this limit or impair the right of the officer appearing before the Board to traverse the case as so presented in its entirety. In many instances where the record evidence is imperfect it has to be supplemented, and facts known only to the officer which may have a direct or indirect bearing in his case are within his province to produce before the Board.

Under all circumstances "a full and fair hearing" (section 1455) is sought to be obtained, and then only upon all the facts and opinions presented is the deliberate judgment of the whole board set forth.

The subject of this paper, it is assumed, has been demonstrated. In closing, with the mind of the writer reverting to the words "an incident of the service," there is recalled the broad and liberal views as thus set forth by the late Attorney-General Richard Rush:

> Such are the changes and uncertainties of the military life, such oftentimes its trials as well as its hazards, that the seeds of disease, which finally prostrate the constitution, may have been hidden as they were sown, and thus be in danger of not being recognized as first causes of disability.

(References: Best on Evidence, Greenleaf on Evidence, Stephens on Evidence, Ram on Facts, Burrill's Law Dictionary, Ordronaux's Jurisprudence of Medicine, Guy's Forensic Medicine, Sawyer on Expert Testimony, Lawson, Expert and Opinion Evidence.)